

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of THOMAS C. and
LINDA A. EVANS.

THOMAS C. EVANS,

Respondent,

v.

LINDA A. EVANS,

Appellant.

D052578

(Super. Ct. No. D447216)

APPEAL from orders of the Superior Court of San Diego County, Lisa A. Foster,
Judge. Affirmed.

In this marital dissolution and child custody and visitation case, Linda A. Evans
(Linda)¹ appeals for a second time in propria persona,² this time from the family court's

¹ We use first names for clarity and convenience only and intend no disrespect.

² In her previous appeal, *In re Marriage of Evans* (June 24, 2008, D051201) (nonpub. opn.), Linda unsuccessfully appealed two ex parte orders the family court

January 31, 2008³ orders (the January 31 orders), which awarded sole legal custody and primary physical custody of their minor children T. (the daughter) and T. (the son) (together the children) to Thomas and modified the child visitation orders to permit Linda to have scheduled unsupervised visitation with the children.⁴ As in the prior appeal, Thomas has not filed a respondent's brief.⁵

Linda challenges the January 31 orders on more than a dozen grounds (discussed, *post*). We affirm the orders.

BACKGROUND

As discussed in this court's opinion in Linda's prior appeal, the family court appointed Marjorie Ospeck as the outside mediator in April 2006 and issued an order prohibiting Linda from appearing *ex parte* for any reason other than a "true life or death

issued on June 5, 2007: (1) an order denying her in propria persona requests for issuance of a temporary restraining order and an order to show cause (OSC) re preliminary injunction against her former husband Thomas C. Evans (Thomas) and for the calendaring of an OSC hearing "to address the matter of Child Custody Modification"; and (2) an order awarding \$1,000 in sanctions against her, payable to Thomas.

³ All further dates are to calendar year 2008 unless otherwise specified.

⁴ Linda's meandering 38-page statement of the factual and procedural background of this case is not a model of clarity. Our review of the record indicates that although temporary custody and visitation arrangements had previously been ordered, the January 31 orders are the court's final custody and visitation determinations.

⁵ On October 30, 2008, this court notified Thomas under rule 8.220(a)(2) of the California Rules of Court that if he failed to file a respondent's brief within 15 days of the notice, the appeal would be decided on the record, the opening brief, and any oral argument by the appellant.

emergency regarding any of her children" or "[t]o ask the Court for permission to file an [OSC] or Motion;" and it required her, in any making any ex parte request for a hearing, to "provide the Court with a completed report by the Special Master, and/or a completed report by the Outside Mediator, and/or other evidence proving a hearing is necessary."

In January their daughter T. was 14 years of age. The son T. was 17.

A. January 17 Hearing

At the January 17 hearing in this case, Linda and Thomas (together the parents) stipulated on the record to allow the court to meet confidentially and individually with the children in chambers on January 25, without the presence of the parents, and to have a court reporter prepare a sealed transcript of the proceedings. Noting that the children had been "subjected to a lot of turmoil" and the parents could not agree on a proper course of treatment for them, the court indicated that the purpose of the interviews with the children was to permit the court to learn first hand their thoughts and opinions and to see how they were doing. Stating that "nothing in the Family Code . . . presumes that there should be joint custody in a situation like this where the parents cannot agree about the proper course of treatment for their children," the court issued an interim order awarding to Thomas sole legal and physical custody of the children pending further court order at the January 31 hearing. Based on Ospeck's report and other documentation, the court found the conflict between the parents made them unable to focus on the children, and it was in the children's best interest that Thomas have sole interim legal custody so as to "be able to make some decisions without having that conflict interfere." The court also found a "consistent problem" in retaining treatment providers for the children that had resulted

principally from Linda's "bombardment" of repeated demands for therapist reports that were "inappropriate and interfering with the children getting proper treatment."

B. January 31 Hearing and Ruling

At the January 31 hearing, the court granted Linda, who represented herself, an opportunity to present her arguments. Linda complained that Thomas had not shown proof to the court that he had sought counseling that a court-appointed psychologist (Dr. Volcani) had "mandated." She also complained that Thomas had physically abused the children two years before, yet the court "mandated" on January 17 that she have no contact with the children. Linda requested that she be allowed to file a contempt motion against Thomas, that Thomas be ordered to seek anger management therapy, and that Thomas be "cautioned" against "any additional inappropriate conduct" against the children or against her or her family members.

Thomas's counsel argued that Linda's accusations were unsupported by evidence, and the litigation was harmful to the children. He urged the court to adopt the recommendation contained in Ospeck's July 10 report with two modifications: that the court award Thomas sole legal custody and sole physical custody of the children and that he not be ordered to undergo a psychological evaluation. Commenting that Judge Trapp had "found [Linda] to be a vexatious litigant" and observing that Ospeck's report "pretty much points out the same thing," counsel asked the court to fashion an order similar to Judge Trapp's to keep Linda from "constantly coming to Court ex parte by noticed motion" and "let the [children] go on with their lives without all this trauma and stress affecting them."

The court issued its ruling, awarding to Thomas sole legal custody and primary physical custody of the children. The court found that "two things [were] blatantly clear": (1) the parents were unable to share decisionmaking due to a "fundamental distrust of each other that is so deep that it's unbridgeable"; and (2) Linda's allegations of child abuse over the years were unsubstantiated and uncorroborated. The court stated it did not believe the children would be in danger while in Thomas's care. The court also found that it was in the children's best interests to have one parent make decisions for them regarding their health, welfare and education as the ongoing conflict between the parents had been detrimental to the children, and the inability of the parents to agree on important decisions regarding the health, education and welfare of the children had harmed the children.

With respect to visitation, the court noted that Ospeck's recommendation that Linda's visitation with the children be supervised was based on a concern that Linda talks negatively about Thomas. However, the court rejected that recommendation and ordered that Linda be allowed to have unsupervised visitation with both children. The court found the children were aware their parents do not like each other, and they were both mature enough to visit with Linda without supervision. The court then set a visitation schedule that permitted Linda to have unsupervised visitation for periods of time that increased over time.⁶ Linda reacted by complaining that it was "not normal having

⁶ With respect to visitation, the court's formal order provides: "5) Beginning Saturday February 2, 2008. [Linda] shall have unsupervised visitation with the minor children on alternate Saturdays from 10:00 a.m. to 4:00 p.m.[:]; [¶] 6) Beginning Saturday

children get to see their Mom a few hours here and a few hours there," which she characterized as "penalizing the kids for sharing things with me." Linda commented that she had made a "mistake" by bringing those things to the court's attention and that the children "have no respect for the Court anymore." The court admonished Linda, "If I believed that you go back to [the daughter] and tell her that this Court didn't listen to her and the result of this is that she wasn't paid attention to, you can be sure there is going to be a problem in the future. That is precisely . . . the problem."

The court indicated it had reviewed Linda's contempt motion and told Linda it would not permit her to file it in its current form because such motions have to be "precisely drawn," and the court would have to "dismiss it on my own motion because it's not done properly." However, the court encouraged Linda to consult with an attorney or go to a law library and read a treatise about contempt and told her that if she drafted the motion again and wanted to submit it, the court would consider it again. The court renewed the order that if Linda wanted to file a motion, she was required to first submit it to the court for review and a determination whether it could be filed.

June 21, 2008,, if each child so chooses, [Linda] shall have unsupervised visitation with the minor children on alternate Saturdays from 10:00 a.m. to 9:00 p.m.[:] [¶] 7) Beginning Saturday August 30, 2008, if each child so chooses, [Linda] shall have unsupervised visitation with the minor children on alternate weekends from Saturday at 1:00 p.m. to Sunday at 1:00 p.m.[:] [¶] 8) Beginning Saturday November 8, 2008, if each child so chooses, [Linda] shall have unsupervised visitation with the minor children on alternate weekends from Friday at 7:00 p.m. to Sunday at 5:00 p.m."

On February 21 the court filed its formal findings and order after hearing based on the foregoing findings and rulings. Linda's appeal from the court's January 31 orders followed.

LEGAL STANDARDS

Because a trial court's decision is presumed to be correct, it is the appellant's burden on appeal to show the court prejudicially erred. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631-632.)

We are mindful that Linda represents herself on appeal. However, her status as a party appearing in propria persona does not provide a basis for preferential consideration. "A party proceeding in propria persona 'is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys.' [Citation.] Indeed, "'the in propria persona litigant is held to the same restrictive rules of procedure as an attorney.'" [Citation.]" (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

DISCUSSION

I. *CHILD CUSTODY AND LINDA'S VISITATION RIGHTS*

Linda first contends the court erred when it ruled on January 31 that, although supervised visitation was lifted, her contact with the children would continue to be very limited. This contention is unavailing.

A. Applicable Legal Principles

Under Family Code⁷ section 3100, subdivision (a), "the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. . . ."

Visitation may be suspended or severely restricted, however, if the court determines this would be in the child's best interest. (See *In re Marriage of Economou* (1990) 224 Cal.App.3d 1466, 1487.) In an initial custody determination, a trial court, considering all of the circumstances, has the widest discretion to choose a parenting plan that is in the best interests of a child. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32; § 3040, subd. (b).)

Section 3011 sets forth a list of specific factors ("among any other factors it finds relevant") that the trial court must consider in determining the "best interest" of the child in a proceeding to determine custody and visitation, including the health, safety, and welfare of the child, any history of abuse by one parent against the child or against the other parent, and the nature and amount of contact with both parents.

The California Supreme Court has explained that "[t]he standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 32.)

⁷ All further statutory references are to the Family Code unless otherwise specified.

B. *Analysis*

Linda complains that "NO proper showing that 'Joint Custody' of [the children] and/or 'Reasonable' Visitation would be to their detriment [was] presented." (Boldface omitted.) However, this claim—that the court was required to award joint legal and physical custody "and/or" more liberal visitation unless there was a "proper showing" that such an award would be detrimental to the children—is unsupported by any legal authority or any conceivable reading of the statutes on which she relies (§§ 3100, subd. (a) (already discussed) & 3080.)⁸

As the appellant, Linda has also failed to meet her burden of showing the court's custody and visitation rulings were unreasonable and thus an abuse of its legal discretion. The record shows that, as required by section 3011, the court considered the health, safety, and welfare of the children, as well as Linda's allegations that Thomas had a history of abusing the children, and the nature and amount of the children's contact with both parents. Specifically, in issuing its interim rulings on January 17, the court found the parents were unable to agree on a proper course of treatment for the children; and there was a consistent problem in retaining treatment providers for them, principally as a result of Linda's "bombardment" of repeated and inappropriate demands for therapist reports. On January 25 the court met with both of the children upon the stipulated

⁸ Section 3080 provides: "There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child, subject to Section 3011, *where the parents have agreed to joint custody or so agree in open court* at a hearing for the purpose of determining the custody of the minor child." (Italics added.) This section is inapplicable because the parents did not agree to joint custody.

agreement of the parents for the purpose of learning first hand the children's thoughts and opinions, and of seeing how they were doing. In issuing its January 31 orders, the court found the parents were unable to share decisionmaking due to a "fundamental" and "unbridgeable" distrust of each other. The court also determined that Linda's "allegation after allegation after allegation" over the years of child abuse by Thomas were unsubstantiated and uncorroborated; it was in the children's best interests to have one parent make decisions regarding their health, welfare and education; and the ongoing conflict between the parents had been detrimental to the children. Linda's conclusory arguments on appeal fall far short of demonstrating that the court abused its discretion in issuing the January 31 orders regarding custody and visitation.

II. VISITATION FOR ONLY A FEW HOURS PER MONTH

Linda next contends the court erred when it ruled her contact with the children be for only a few hours per month. She also complains that "[n]o 'Co-Parenting Plan' or 'Holiday Sharing' Proposal requested by [her] was granted."

For reasons already discussed, the court did not abuse its discretion in issuing the January 31 orders regarding custody and visitation. In addition, the court-ordered visitation schedule provides for visitation of increasing duration over time, and the court rejected Ospeck's recommendation that Linda's visitation with the children continue to be supervised.

With respect to the holiday schedule, Thomas's counsel suggested at the January 31 hearing that the matter be continued and that both parties submit their proposed holiday visitation schedules prior to the next hearing. The court asked Linda, "[D]oes

that work for you?" Linda replied, "That would be fine." The court then ordered the parents to file their proposed holiday child sharing schedules no later than March 13 and reserved jurisdiction to make holiday child sharing orders at a hearing on March 27. Linda has improperly challenged those rulings after agreeing to them. We conclude Linda's claims are unavailing.

III. *MEDIATION*

Relying on section 3170, subdivision (a), and without citing to the record, Linda next contends the court "erred when mediation never took place just prior to the Court making 'Permanent' Orders of Child Custody." (Boldface omitted.) Linda's contention is not supported by the record.

Section 3170, subdivision (a) provides: "If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation."

Here, the reporter's transcript of the January 31 proceedings indicates that Thomas's counsel urged the court to adopt the recommendations set forth in outside mediator Ospeck's July 10, 2007 report with two specified modifications, and, in making its determinations, the court indicated it had read the report and considered Ospeck's recommendations. The record thus shows the contested issues of child custody and visitation were the subjects of mediation before the court made its final determinations with respect to those issues.

IV. COURT'S JANUARY 25 MEETING WITH THE CHILDREN

Linda also contends the court erred on January 25 "upon meeting with the Evans' children for only a brief duration upon which the January 31, 2008 Ruling of 'Permanent' Custody was partially based." This contention is unavailing. As already discussed, the record shows that Linda stipulated to that meeting.

V. ORDER TO SHOW CAUSE RE CONTEMPT

Noting that on January 17 she "submitted an 'Order To Show Cause and Affidavit of Contempt' against [Thomas] for violation of Orders pertaining to Child Custody and Visitation," Linda contends, without citing to the record, that the court "erred by failing to take this into CAREFUL CONSIDERATION before making a 'Permanent' Order of Child Custody." (Emphasis omitted.)

This contention is unavailing. The record shows the court informed Linda on January 31 that it had reviewed what Linda referred to as her "contempt motion," and told her it would not permit her to file it in its current form because it was not properly prepared. After advising her to consult with an attorney or go to a law library and read a treatise about contempt, the court told Linda that if she drafted the motion again and wanted to submit it, the court would consider it again. Linda makes no attempt to show that she had properly prepared her motion.

VI. ALLEGED CHILD ABUSE

Linda next contends the court "erred upon ruling . . . that the [children] are in no danger while continuing to reside primarily with [Thomas], that there was NO

corroboration that [he] ha[d] committed any acts of Child Abuse, and thus awarded [him] 'sole legal custody of the [children] and primary physical custody.'" (Emphasis omitted.)

These contentions are unavailing. It is not clear from Linda's appellant's opening brief what evidence she is relying upon. She presents a rambling 38-page statement of facts in which she refers to various videotapes, declarations, and other matters of record involving her adult son S. and daughter, some dating back to 2002. The court found that Linda's allegations of child abuse over the years were unsubstantiated and uncorroborated. The court also found that the children would not be in danger while in Thomas's care. Linda's argument that these findings were erroneous is completely conclusory. She does not argue the evidence is insufficient to support those findings, and she provides no citations to the record in support of her argument.

VII. *SAFEGUARDS FOR THE PROTECTION OF THE CHILDREN*

Linda also contends the court erred by knowingly leaving the children without any safeguards or advocates "by which to confide further misconduct of [Thomas's] to." We reject this contention as Linda is essentially challenging the court's custody and visitation orders, but she has not met her burden of demonstrating the court abused its legal discretion. In any event, the court specifically ordered that the children may contact Linda by telephone "on an unlimited basis." The court thus did provide a "safeguard" by which the children may report to her directly any "misconduct" by their father.

VIII. *ALLEGED HISTORY OF CHILD ABUSE AND LACK OF COOPERATION*

Next, Linda contends the court "erred in not placing in its January 31, 2008 Order that [Thomas] has a history of Child Abuse and lack of Parental Cooperation."

(Emphasis omitted.) This contention is unavailing.

In its formal order, the court found that "there is no credible evidence that [Thomas] has abused the minor children," and Linda's "allegations of child abuse of the children by [Thomas] are unsubstantiated." As already discussed, Linda has failed to meet her burden of showing the court abused its discretion in making these findings.

With respect to the issue of parental cooperation, the court's order included an express finding that "the inability of the parents to agree on important decisions regarding the health, education and welfare of the children ha[d] harmed the children." However, as already discussed, the court's award of sole legal custody and primary physical custody of the children to Thomas was based in part on its previous finding that there was a consistent problem in retaining treatment providers for the children, principally as a result of Linda's repeated and inappropriate demands for therapist reports. In addition, Linda has failed to meet her burden of showing that the court abused its discretion by failing to include in its order a finding that Thomas had a "history of lack of parental cooperation."

IX. *FAMILY COURT SERVICES*

Linda also contends the court erred on January 31 "when, following being provided significant documentation of inappropriate conduct and abuse towards the [children] by [Thomas], Family Court Services had NOT been assigned to investigate prior to [the January 31 hearing]." (Emphasis omitted.)

We reject this contention. As already discussed, Linda has failed to meet her burden of showing the court abused its discretion in finding that there was no credible evidence that Thomas had abused the children and that Linda's allegations he had abused them were unsubstantiated. We conclude she has also failed to show the court prejudicially erred by not "assign[ing]" Family Court Services to investigate allegations that Thomas had engaged in "inappropriate conduct and abuse" towards the children.

X. CONTEMPT

Without stating her contention, and without citing to the record, Linda complains that she "has regularly addressed in her Court-submitted Declarations and in statements made to the Court of [Thomas's] ongoing failure to supply the Court with ANY PROOF that he has EVER attended therapy of ANY type." (Boldface omitted.) She then suggests the court should have subjected Thomas to "a contempt adjudication and statutory contempt penalties."

Although Linda filed an order to show cause and affidavit for contempt on January 17, which the court denied without prejudice on January 31, she did not allege therein that Thomas had violated a court order requiring him to seek therapy. Linda has failed to demonstrate any basis for appeal with respect to Thomas's alleged failure to seek therapy.

XI. AWARD OF CUSTODY TO A "BATTERER"

Next, Linda contends the court erred when it ordered that Thomas be granted sole legal custody and primary physical custody of the children despite substantiation that Thomas had committed child abuse.

As already discussed, Linda has failed to meet her burden of showing the court abused its discretion in finding that there was no credible evidence that Thomas had abused the children and that Linda's allegations were unsubstantiated.

XII. APPOINTMENT OF COUNSEL

Without specifying her contention, and without any reference to the record, Linda next complains that she "has made the Court aware on a repetitive basis that she has been unable to afford Legal Counsel yet the Court DID NOT appoint one on her behalf." (Emphasis omitted.)

Linda's complaint is unavailing. She is appealing from the court's January 31 orders. Because she has not shown that she requested appointment of counsel at the January 31 hearing and has not shown entitlement to such appointment, Linda has waived this claim of error.

XIII. TIMELINESS OF THE CHILD CUSTODY RULING

Last, without any reference to the record, Linda contends the court erred by "making a 'Permanent Ruling' on Child Custody after more than six years which violated the [children's] and [her] Constitutional Rights of a Parent-Child Relationship and Family Codes, thus necessitating this Appeal being filed." (Boldface omitted.)

In support of this contention, Linda relies solely on section 3454, which provides in part that "[a]n appeal may be taken from a final order in a proceeding under this chapter in accordance with expedited appellate procedures in other civil cases."

The statute on which Linda relies pertains to appellate procedures. It does not in any way support her contention that the court's alleged delay in ruling on the issue of child custody violated her constitutional rights.

DISPOSITION

The orders are affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.